

MICHIGAN SUPREME COURT



Office of Public Information

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FOR IMMEDIATE RELEASE

JUDICIAL MISCONDUCT CHARGE, MEDICAL EXPERTS ISSUE TO BE CONSIDERED AT ORAL ARGUMENTS BEFORE MICHIGAN SUPREME COURT

LANSING, MI, December 13, 2005 – A judge who was presented with football tickets by an attorney in his courtroom will have his case argued before the Michigan Supreme Court tomorrow.

In *In re Haley*, the Judicial Tenure Commission, which prosecutes judicial misconduct charges, argues that Judge Michael Haley of the 86th District Court in Traverse City violated judicial ethics rules by accepting the tickets, although he later gave them to a court employee. The attorney gave Haley the tickets while the attorney was in Haley's courtroom. The JTC has recommended that the Michigan Supreme Court publicly censure Haley for the incident. Haley contends that the attorney's offer was merely a gesture of ordinary social hospitality, which state judicial ethics rules allow judges to accept.

Also before the Court are two cases involving challenges to expert witnesses in medical malpractice cases. Under the governing state statute, MCL 600.2169, an expert in a medical malpractice case must "specialize at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty." The statute also requires the expert to devote a majority of his professional time to the active clinical practice of the defendant physician's specialty. In *Woodard v Custer* and *Hamilton v Kuligowski*, the proposed plaintiffs' experts were board certified in the same specialties as the defendant physicians against whom they would testify. But the trial court in *Woodard* determined that the proposed expert was not qualified to testify against the defendant doctor because the expert, unlike the defendant, did not have any certificates of special qualifications. Similarly, in *Hamilton*, the trial court found that the plaintiff's expert was not qualified because he practiced in the field of infectious disease, while the defendant primarily saw geriatric patients. The Supreme Court will now consider whether the proposed experts are qualified.

The remaining 10 cases involve issues of insurance, worker's compensation, medical malpractice, governmental immunity, tort, procedure, and criminal law.

Court will be held on **December 14 and 15**. Court will convene at **9:30 a.m.** each day. The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice in Lansing.

(Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's website at http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. For further details about the cases, please contact the attorneys.)

Wednesday, December 14, 2005
Morning Session

IN RE HALEY (case no. 127453)

Attorneys for petitioner Judicial Tenure Commission: Paul J. Fischer, Anna Marie Noeske/(313) 875-5110

Attorney for respondent Judge Michael Haley: Brian Einhorn/(248) 355-4141

At issue: A judge accepted football tickets from an attorney who was appearing before the judge in his courtroom. Did the judge violate ethical rules? If so, should the Michigan Supreme Court publicly censure the judge?

Background: Judge Michael Haley is a judge of the 86th District Court in Traverse City. On October 14, 2004, the judge presided over a plea hearing in which retired judge Richard Benedict appeared as the attorney for the defendant. After the judge accepted the guilty plea, Benedict asked if he could “[a]pproach the bench?” Haley granted permission, and Benedict walked up to the bench and placed on it two University of Michigan football tickets. The record of the proceedings shows that Benedict then asked the judge to “promise to go” and added that, “[i]f you can’t go, somebody’s got to go.” Haley said that he would make sure that “somebody goes and that [Benedict gets] paid.” Benedict said that he did not need to be paid, but that he wanted to be sure that someone used the tickets. After this discussion, the judge sentenced Benedict’s client. Later, the judge gave the tickets, which had a value of \$92, to a court employee. The Judicial Tenure Commission (JTC) filed a complaint, alleging that, among other things, Haley’s actions violated the ethical rules that govern a judge’s behavior. The Supreme Court appointed Judge Casper O. Grathwohl to act as a special master and consider the allegations in the complaint. Grathwohl determined that the JTC did not prove that Haley committed judicial misconduct, although Grathwohl did conclude that Haley’s acceptance of the tickets was “inappropriate” and “displayed poor judgment.” The JTC, while agreeing with most of Grathwohl’s factual findings, concluded that Haley did commit judicial misconduct. A majority of the JTC recommended that Haley receive a public censure. Haley disputes both the JTC’s finding of misconduct and its discipline recommendation. He notes that the Michigan Code of Judicial Conduct allows judges to accept gestures of ordinary social hospitality and argues that his acceptance of the football tickets falls within that category. The JTC disagrees, contending that Haley’s decision to accept football tickets from an attorney who regularly appears before him was improper and created an appearance of impropriety, warranting a public censure.

WOODARD, et al. v CUSTER et al. (case nos. 124994-124995)

Attorneys for plaintiffs Johanna Woodard, Individually and as Next Friend of Austin D. Woodard, a Minor, and Steven Woodard: Craig L. Nemier, Nancy V. Dembinski/(248) 476-6900, Mark R. Granzotto/(248) 546-4649

Attorneys for defendants Joseph R. Custer, M.D. and University of Michigan Medical Center: Kevin P. Hanbury/(248) 646-1514, Richard C. Kraus/(517) 332-3030

Attorneys for amicus curiae American Board of Medical Specialties: Max R. Hoffman, Jr., M. Brian Cavanaugh, Debra A. Geroux/(517) 372-6622

Attorneys for amicus curiae American Board of Pediatrics: Max R. Hoffman, Jr., M. Brian Cavanaugh, Debra A. Geroux/(517) 372-6622

Attorney for amicus curiae Michigan State Medical Society: Joanne Geha Swanson/(313) 961-0200

Attorney for amicus curiae Michigan Trial Lawyers Association: Mark R. Bendure/(313) 961-1525

Trial court: Washtenaw County Circuit Court

At issue: At issue is whether the plaintiffs' proposed expert witness is qualified to testify regarding the alleged malpractice of the defendant physician. MCL 600.2169 states that an expert must "specialize at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty." The statute also requires the expert to devote a majority of his professional time to the active clinical practice of the defendant physician's specialty. In this case, both the plaintiff's expert and the defendant are board-certified pediatricians, but the defendant also holds certificates of special qualifications in pediatric critical care medicine and neonatal perinatal medicine, while the expert does not.

Background: The Woodards' 15-day-old son was admitted to the Pediatric Intensive Care Unit at the University of Michigan Hospital, where he was treated for a respiratory problem. He was under the care of Dr. Joseph Custer, the director of Pediatric Critical Care Medicine. When the infant was moved to the general hospital ward, physicians in that ward discovered that both of the infant's legs were fractured. The Woodards sued Custer and the hospital, alleging that the fractures were the result of negligent medical procedures. Custer is board certified in pediatrics and has certificates of special qualifications in pediatric critical care medicine and neonatal-perinatal medicine. The Woodards' proposed expert witness, Dr. Anthony Casamassima, is board certified in pediatrics, but does not have any certificates of special qualifications. The trial court determined that Casamassima was not qualified under MCL 600.2169 to testify against Custer and dismissed the Woodards' lawsuit. In an unpublished opinion, the Court of Appeals affirmed the trial court's ruling that Casamassima was not qualified to testify under MCL 600.2169. But the Court of Appeals remanded the case for trial, concluding that, due to the nature of their son's injuries, the Woodards did not need an expert to support their claims of negligence. The Supreme Court reversed that part of the Court of Appeals opinion earlier this year, holding that the Woodards could not proceed without expert testimony. The Supreme Court will now consider whether the Woodards' proposed expert is qualified under MCL 600.2169 to testify against Custer.

HAMILTON, et al. v KULIGOWSKI (case no. 126275)

Attorney for plaintiff Shirley Hamilton, Personal Representative of the Estate of Rosalie Ackley: Ramona C. Howard/(313) 961-4400

Attorney for defendant Mark F. Kuligowski, D.O.: Raymond W. Morganti/(248) 357-1400

Attorney for amicus curiae Accreditation Council for Graduate Medical Education:

Douglas L. Prochnow/(312) 201-2000

Attorney for amicus curiae Michigan State Medical Society: Joanne Geha Swanson/(313) 961-0200

Attorney for amicus curiae Michigan Trial Lawyers Association: Mark R. Bendure/(313) 961-1525

Trial court: Saginaw County Circuit Court

At issue: MCL 600.2169 states that a medical expert testifying about the standard of care must “specialize at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.” The statute also requires the proposed expert to devote a majority of his professional time to the active clinical practice of the defendant physician’s specialty. In this case, the defendant physician is board certified in internal medicine and primarily treats geriatric patients. The plaintiff’s expert is board certified in internal medicine, with a specialty in treating infectious disease. Is the plaintiff’s expert qualified to testify against the defendant physician under MCL 600.2169?

Background: Shirley Hamilton sued Dr. Mark Kuligowski for medical malpractice. Hamilton claimed that Kuligowski’s negligence caused his patient Rosalie Ackley to suffer a stroke in 1998. Ackley died in 2000. At trial, the plaintiff presented expert witness Dr. Arnold Markowitz to testify about Kuligowski’s alleged negligence. Both Kuligowski and Markowitz are board certified in internal medicine. But Kuligowski is a general internist who primarily sees geriatric patients, while Markowitz focuses his practice on the treatment of infectious disease. The trial court ruled that Markowitz was not qualified to testify against Kuligowski; the judge concluded that “it’s apparent that [Markowitz] does not practice a majority of his time in the field of internal medicine but rather in the field of infectious disease” The trial court then granted Kuligowski’s motion for a directed verdict and dismissed the plaintiff’s lawsuit. The plaintiff appealed, and the Court of Appeals reversed in a published decision, finding that Markowitz was qualified under MCL 600.2169 to testify against Kuligowski, and that the trial court erred in dismissing the lawsuit. Kuligowski appeals.

Wednesday, December 14, 2005

Afternoon Session

KROCHMAL v THE PAUL REVERE LIFE INSURANCE COMPANY (case no. 126997)

Attorneys for plaintiff Ralph Krochmal: Mark R. Granzotto/(248) 546-4649, David B. Grant/(248) 353-2860

Attorney for defendant The Paul Revere Life Insurance Company: K. Scott Hamilton/(313) 223-3500

Attorney for amicus curiae Commissioner of the Office of Financial and Insurance Services: Michael P. Farrell/(517) 373-1160

Trial court: Wayne County Circuit Court

At issue: Is the disability policy in this case governed by contract law or by the Employee Retirement Income Security Act (ERISA), 29 USC § 101 *et seq.*? If the policy is not governed by ERISA, does policy language that requires the claimant to submit “satisfactory written proof of loss” permit a court reviewing the disability insurer’s claim determination to apply a de novo standard of review? Or should the insurance company’s disability determination be reviewed under the more deferential abuse of discretion standard?

Background: Ralph Krochmal obtained a disability insurance policy from The Paul Revere Life Insurance Company in 1987. The premiums were paid by Krochmal’s closely held corporation. Beginning in 1996, Paul Revere paid Krochmal benefits under the policy for three years for a mental disability. Paul Revere discontinued benefits when its claims representative reviewed several current, but conflicting, medical reports and concluded that Krochmal no longer suffered from a disabling medical condition. Krochmal sued Paul Revere, alleging breach of contract. In response, Paul Revere claimed that the policy was a benefit plan governed by the Employee Retirement Income Security Act (ERISA). 29 USC § 1001 *et seq.* Paul Revere also noted that the policy required Krochmal to submit “satisfactory written proof of loss.” That provision meant that a court reviewing Paul Revere’s determination that Krochmal was not disabled had to do so under the arbitrary and capricious standard of review, the insurer contended. The trial court disagreed with both of Paul Revere’s arguments. The court held that ERISA did not govern the policy. It also determined that it would review Paul Revere’s claims determination under the less deferential de novo standard of review. In a separate hearing, the court reviewed the merits of Krochmal’s claim and found that he was disabled within the meaning of the policy; it ordered Paul Revere to pay disability benefits to Krochmal. Paul Revere appealed to the Court of Appeals. In a published opinion, the Court of Appeals affirmed the trial court’s finding that ERISA did not govern the policy. It also applied a de novo standard of review, finding this review to be required by *Guiles v University of Michigan Bd of Regents*, 193 Mich App 39 (1992). But the panel stated that, if it were not bound to follow *Guiles*, it would find that the policy granted discretion to Paul Revere to make the disability determination, and that Paul Revere’s decision could only be reviewed under an abuse of discretion standard. Paul Revere appeals.

BENTFIELD v BRANDON’S LANDING BOAT BAR, et al. (case no. 127515)

Attorney for plaintiff Christopher D. Bentfield: Joseph M. Pascuzzi/(248) 948-9696

Attorney for defendants Brandon’s Landing Boat Bar, David Watts, Inc., and David

Watts: Richard F. Carron/(248) 204-4649

Trial court: Oakland County Circuit Court

At issue: The trial court granted the defendants’ motion for summary disposition and then denied the plaintiff’s motion for reconsideration, in which the plaintiff argued for the first time that there was an additional basis for imposing liability on the defendants. Did the Court of Appeals err when it determined that the trial court’s denial of the motion for reconsideration was an abuse of discretion?

Background: Christopher D. Bentfield lived in a single apartment above Brandon’s Landing, a bar owned by David Watts. Bentfield slipped on snow-covered ice and fell near the outside front entrance to the bar, fracturing his ankle. Bentfield sued Watts, his corporation, and the bar. Bentfield claimed that he was a business invitee and tenant, and that the defendants were negligent in failing to prevent a dangerous accumulation of snow and ice on the premises. The trial court granted the defendants’ motion for summary disposition, finding that the condition of

snow and ice was open and obvious. Bentfield filed a motion asking the trial court to reconsider its decision. In the motion, he argued, for the first time, that the defendants should be held liable because they had a statutory obligation to maintain the premises under MCL 554.139. The trial court denied Bentfield's motion for reconsideration, ruling that Bentfield had not demonstrated a "palpable error" by which the court and the parties had been misled, and that he merely presented the same issues that the court had previously decided. The Court of Appeals unanimously affirmed the trial court's grant of summary disposition based on the open and obvious nature of the hazard, but in a split unpublished decision found that the trial court's denial of the motion for reconsideration was an abuse of discretion. Ordinarily, it is not an abuse of discretion for a trial court to deny a motion for reconsideration where a claim is presented for the first time, the majority said. In Bentfield's case, however, the trial court abused its discretion because the court's ground for denial -- that the issue raised in the motion had been previously ruled upon -- was incorrect, and because of the recentness of the case law supporting Bentfield's claim. The defendants appeal.

DONOHO v WAL-MART STORES, INC., et al. (case no. 127537)

Attorneys for plaintiff Mary A. Donoho: David M. Stewart, Richard C. Hohenstein/(810) 767-8800

Attorney for defendants Wal-Mart Stores, Inc. and Insurance Company of the State of Pennsylvania: Jon D. Vander Ploeg/(616) 774-8000

Attorney for amicus curiae Michigan Self-Insurers' Association: Martin L. Critchell/(248) 593-2450

Tribunal: Worker's Compensation Appellate Commission

At issue: MCL 418.315(1) states that a magistrate may "prorate attorney fees at the contingent fee rate paid by the employee" in a worker's compensation case where medical expenses are awarded. Should an attorney fee come out of the medical award or be imposed in addition to it?

Background: After Mary A. Donoho received an open award of worker's compensation benefits, she and the defendants could not agree on the payment of specific medical expenses. To resolve the issue, Donoho filed a petition with a worker's compensation magistrate. She asked the magistrate to enter an order requiring payment for the disputed medical expenses, to assess a penalty against the defendants, and to award her a 30 percent attorney fee on top of the expenses. The magistrate granted the relief that Donoho requested. In particular, in addition to the unpaid medical expenses, he ordered the defendants to pay a 30 percent attorney fee to Donoho's counsel. In support of his decision, the magistrate cited § 315(1) of the worker's compensation act, which states, "If the employer fails, neglects, or refuses to [pay a reasonable medical expense], the employee shall be reimbursed for the reasonable expense paid by the employee The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee." The defendants challenged the attorney fee award at the Worker's Compensation Appellate Commission (WCAC), arguing that the attorney fee should come out of the award of medical expenses, rather than being imposed on top of the award as a penalty. The WCAC affirmed the magistrate's ruling, although one commissioner expressed the view that § 315(1) "cannot reasonably be read to provide for penalty attorney fees." The defendants sought leave to appeal to the Court of Appeals, but that court denied their application for lack of merit. The defendants appeal.

BEHNKE v AUTO OWNERS INSURANCE COMPANY, et al. (case no. 127459)

Attorney for plaintiff Bruce Behnke: Eugene H. Petruska/(989) 732-2491

Attorney for defendant Auto Owners Insurance Company: Richard G. Bensinger/(989) 732-7536

Trial court: Chippewa County Circuit Court

At issue: To bring an action for noneconomic tort damages under the no-fault insurance act, MCL 500.3135(1), a plaintiff must establish a “serious impairment of body function.” The act defines “serious impairment of body function” as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” MCL 500.3135(7). Did the plaintiff suffer a serious impairment of body function?

Background: After Bruce Behnke was injured in a car accident, he sued Auto Owners Insurance Company to recover noneconomic damages that he claimed arose from his injuries. He alleged that he was entitled to recover damages under MCL 500.3135(1) because he had suffered a serious impairment of an important body function. At a bench trial, Behnke presented evidence that he had experienced neck pain and intense headaches following the accident. But the medical evidence also showed that Behnke suffered from cervical spine degeneration that was not caused by the accident, and that he had suffered from headaches before the accident. There was evidence that Behnke was able to continue many of his pre-accident activities. But there were periods of time during which Behnke, a welder, missed work or was directed by his physician to limit his physical activities. In addition, Behnke’s wife testified that Behnke was an energetic outdoorsman before the accident but that, after the accident, he became depressed, frustrated and ornery. After the bench trial, the trial court concluded that Behnke had not suffered a serious impairment of an important body function, and entered a judgment of no cause of action in favor of Auto Owners. The Court of Appeals reversed in a split unpublished opinion, holding that the trial court erred in concluding that Behnke’s injuries did not affect his ability to lead his normal life. The dissenting judge faulted the majority for not showing due deference to the trial court’s factual findings. Auto Owners appeals.

Thursday, December 15, 2005

Morning Session

STAMPLIS, et al. v ST. JOHN HEALTH SYSTEM, et al. (case nos. 126980 & 127032)

Attorney for plaintiffs Joseph Stamlis and Theodora Stamlis: Victor S. Valenti/(248) 355-5555

Attorney for defendant St. John Health System, d/b/a River District Hospital: Susan H. Zitterman/(313) 965-7905

Attorney for defendant G. Phillip Douglass, D.O.: John P. Jacobs/(313) 965-1900

Trial court: St. Clair County Circuit Court

At issue: In a medical malpractice case, does the dismissal with prejudice of the plaintiffs’ claim against the defendant physician require dismissal of the plaintiffs’ vicarious liability claim against the hospital?

Background: Joseph and Theodora Stamlis sued Dr. G. Phillip Douglass for medical malpractice; they also sued River District Hospital, where Douglass was an emergency room physician. They claimed that Douglass failed to timely diagnose Joseph Stamlis’ epidural abscess. As a result of the defendants’ negligence, Mr. Stamlis became paraplegic, the plaintiffs contended. On the day of trial, the plaintiffs’ counsel and Douglass’ counsel agreed on

the record that all claims against Douglass would be dismissed. The parties made clear that the dismissal was to be “with prejudice” and that no further claims could be filed against Douglass. When the agreement was being described to the trial judge, the plaintiffs’ attorney stated that he did not intend to give up the plaintiffs’ claim that the other defendant, River District Hospital, was vicariously liable for Douglass’ alleged negligence. The trial court entered a written order stating that the lawsuit against Douglass was dismissed with prejudice. The next day, the River District Hospital filed a motion for summary disposition, arguing that the plaintiffs’ agreement to dismiss their claim against Douglass, the hospital’s agent, meant that the plaintiffs’ vicarious liability claim against the hospital also had to be dismissed. The trial court agreed and entered an order dismissing the hospital from the case. A divided Court of Appeals reversed, vacating both trial court orders in an unpublished per curiam opinion. The defendants appeal, seeking reinstatement of both trial court orders. Alternatively, Douglass asks the Supreme Court to reinstate the stipulated order dismissing him from the case.

PEOPLE v JOHNSON (case no. 127525)

Prosecuting attorney: Jennifer Kay Clark/(269) 969-6980

Attorney for defendant William Laron Johnson: Peter Jon Van Hoek/(313) 256-9833

Trial court: Calhoun County Circuit Court

At issue: In sentencing criminal defendants, trial courts use statutory “offense variables,” which assign a number of points based on various factors in the crime; the number of points is used to determine the length of the sentence. In this case, the defendant objects to the trial court’s decision to assess 10 points under OV-10, for exploitation of a vulnerable victim, and 25 points under OV-11, for a second sexual penetration. Is the defendant entitled to a new trial or resentencing? Did the trial court err by allowing into evidence the defendant’s prior felony convictions?

Background: William Laron Johnson was charged with two counts of third-degree criminal sexual conduct based on the claim that he twice had consensual sex with the complainant before her sixteenth birthday. He testified at trial that, although he did in fact twice engage in sexual intercourse with the young woman, he did not do so until after she was 16 years old. The jury also heard evidence that Johnson had three prior felony convictions for breaking and entering, receiving and concealing stolen property, and larceny. Johnson was convicted by the jury of both counts of third-degree criminal sexual conduct. At the sentencing hearing, Johnson challenged the scoring of several offense variables, including OV-10 and OV-11. The trial judge rejected Johnson’s challenges, and sentenced him, as a fourth habitual offender, to concurrent terms of 100 to 480 months (or 8 years, 4 months to 40 years) in prison. In an unpublished per curiam opinion, the Court of Appeals affirmed the trial court’s admission of the prior felony convictions and upheld Johnson’s sentence. Johnson appeals.

MCDOWELL v CITY OF DETROIT, et al. (case no. 127660)

Attorney for plaintiff Joyce McDowell, as Personal Representative of the estates of Blake Brown, Joyce Brown, and Christopher Brown, deceased, and as Conservator for Jonathon Fish, Joanne Campbell, and Juanita Fish: Victor S. Valenti/(248) 355-5555

Attorney for defendants City of Detroit and the Detroit Housing Commission: James G. Gross/(313) 963-8200

Trial court: Wayne County Circuit Court

At issue: Is negligent nuisance an exception to governmental immunity? Does a fire that starts

in the space between the inner and outer wall of a leased premises trespass when it burns the premises?

Background: Joanne Campbell leased an apartment in a Detroit public housing complex; she lived there with her three minor children, her sister Juanita Fish, and Fish's four children. A fire broke out in the apartment; six of the children died. Fish and one child escaped, but suffered burns. The fire was apparently caused by an electrical defect in the wall space that ignited insulating material; the record indicates that Housing Commission employees visited the apartment at least twice to address electrical complaints. The plaintiff sued the city of Detroit and the Detroit Housing Commission. The amended complaint contained six counts: nuisance per se, nuisance, trespass-nuisance, breach of contract, breach of express and implied warranty of habitability and quiet enjoyment, and violation of the housing code. In particular, the plaintiff claimed that the fire amounted to a trespass because it was a physical intrusion that was set in motion by the city or its agents. The defendants moved to dismiss the case, arguing that they were protected from liability by governmental immunity. The plaintiff responded that governmental immunity did not bar the lawsuit, because the operation of the apartment complex is a proprietary function, which is a statutory exception to governmental immunity. The trial court partially granted and partially denied the defendants' motion. The trial judge held that governmental immunity did not bar the plaintiff's nuisance per se, nuisance, and trespass-nuisance claims. The trial court also held that the plaintiff could pursue her breach of contract and warranty claims. But the judge found that operating public housing is not a proprietary function, and that the defendants did not violate state housing laws. Both parties appealed. In a published opinion, the Court of Appeals held that the defendants' summary disposition motion should have been granted on all but the nuisance in fact and trespass-nuisance counts, and that the operation of the apartment complex was not a proprietary function. The defendants appeal to the Supreme Court, arguing that negligent nuisance is not an exception to governmental immunity, and that the facts of this case do not support the plaintiff's claim of trespass-nuisance.

COSTA, et al. v COMMUNITY EMERGENCY MEDICAL SERVICES, INC., et al. (case nos. 127334-127335)

Attorneys for plaintiffs Richard Costa and Cindy Costa: Mark R. Granzotto/(248) 546-4649, Barbara A. Patek/(586) 307-8392

Attorney for defendants Community Emergency Medical Services, Inc., Dave Henshaw, and Scott Meister: Steven B. Galbraith/(248) 357-3910

Attorneys for defendants Donald Farenger and Lisa M. Schultz: Janet Callahan Barnes/(248) 851-9500, Edward D. Plato/(248) 489-4100

Attorney for amicus curiae Attorney General: Ann M. Sherman/(517) 373-6434

Trial court: Wayne County Circuit Court

At issue: Emergency medical services personnel and city employees attended the plaintiff after he was seriously injured at work. Did their treatment of the plaintiff at the scene of the injury amount to gross negligence? Were these defendants the proximate cause of the plaintiff's injuries? Is the plaintiff's claim against the city employees one for medical malpractice? If so, were the city employees required to file a medical malpractice affidavit of meritorious defense pursuant to MCL 600.2912e?

Background: Richard Costa, a Colorado resident visiting Michigan for a business meeting, was punched in the face by a co-worker and knocked unconscious. Donald Farenger and Lisa Schultz arrived on behalf of the City of Taylor Fire Department emergency medical service.

Dave Henshaw and Scott Meister arrived on behalf of Community Emergency Medical Services, Inc. (CEMS). These medical personnel helped return Costa to consciousness. Costa was able to recall his name, location, and why he was in Michigan, although he could not recall the altercation with his co-worker and had difficulty walking unassisted. Costa refused medical treatment and returned to his hotel room with his co-worker's assistance. But his situation deteriorated and he underwent an emergency craniotomy the next day. Costa and his wife sued CEMS, Henshaw, Meister, Farenger and Schultz for medical malpractice, alleging that the defendants did not do enough at the scene of the assault. The defendants asked the trial court to dismiss the case on the basis of governmental immunity or the Emergency Medical Services Act (EMSA), both of which require a showing of "gross negligence" for the imposition of liability. The trial court denied the motions, but the Court of Appeals reversed. The appeals court ruled that Costa's allegations sounded in ordinary negligence, not gross negligence, and that no reasonable juror could have found that the defendants behaved so recklessly as to demonstrate a substantial lack of concern for whether an injury results. The appeals court also ruled that no reasonable juror could have found that the actions of the city employees, Farenger and Schultz, were the proximate cause of Costa's injuries, because the injuries were so clearly caused by the assault from the co-worker. In addition, the appeals court rejected Costa's contention that Farenger and Schultz should have been held in default for failure to timely comply with the statutory requirement to file a medical malpractice affidavit of meritorious defense pursuant to MCL 600.2912e. The plaintiffs appeal, as do CEMS, Henshaw and Meister.

Thursday, December 15, 2005

Afternoon Session

QARANA v NORTH POINTE INSURANCE COMPANY (case no. 127488)

Attorney for plaintiff Firas Qarana: I. Matthew Miller/(248) 851-8000

Attorney for garnishee-defendant North Pointe Insurance Company: Constantine N. Kallas/(248) 335-5450

Trial court: Oakland County Circuit Court

At issue: This case concerns the meaning of a "cooperation clause" found in a commercial general liability insurance policy. When a default judgment is issued against an insured party, due to its failure to cooperate in litigation, must that party's insurance company pay the default judgment? Is the insurance company required to use reasonable diligence in securing the cooperation of its insured? Is it necessary for the insurance company to show that it was prejudiced by its insured's lack of cooperation?

Background: Firas Qarana was injured in a fight at the Royal Oak Music Theater. He filed a premises liability lawsuit against Paragon Investment Company, which owned the Royal Oak Music Theater. Paragon, in turn, contacted North Pointe Insurance Company, which had issued it a commercial general liability insurance policy, and North Pointe agreed to defend the lawsuit on Paragon's behalf. Soon after, Paragon filed for Chapter 7 bankruptcy. When Qarana's personal-injury lawsuit moved forward, Paragon failed to respond to discovery requests or otherwise participate. In response, Qarana filed a motion for a default judgment, and North Pointe filed a motion asking the trial court for permission to withdraw from the case, due to Paragon's failure to participate. The trial court first granted North Pointe's motion. Then, after an evidentiary hearing, the court granted Qarana's motion and entered a default judgment against Paragon for \$85,846.12. Qarana then sought to collect the judgment from North Pointe, arguing

that North Pointe was obligated, as Paragon's commercial general liability insurer, to satisfy the judgment. North Pointe argued that it was not responsible because Paragon breached the insurance contract by failing to cooperate in the defense of the underlying lawsuit. The trial court ruled in North Pointe's favor. The Court of Appeals reversed in an unpublished per curiam opinion and remanded the case to the trial court for further proceedings. North Pointe appeals.

PEOPLE v YAMAT, JR. (case no. 128724)

Prosecuting attorney: T. Lynn Hopkins/(616) 632-6683

Attorney for defendant Macario G. Yamat, Jr.: Jolene J. Weiner-Vatter/(616) 451-4446

Trial court: Kent County Circuit Court

At issue: The defendant unexpectedly grabbed and turned the steering wheel of a car in which he was a front seat passenger. Was the defendant "operating" a vehicle for the purposes of the felonious driving statute, MCL 257.626c?

Background: Macario G. Yamat, Jr. was a front seat passenger in a car driven by Henrietta Danelson. Yamat and Danelson apparently were engaged in an argument when Yamat reached over and grabbed the top of the steering wheel, causing the moving car to turn. The car went off the road, over the curb, and struck a jogger on the sidewalk. The jogger was seriously injured. The Kent County prosecutor charged Yamat with felonious driving, which requires, among other things, that the prosecutor prove that Yamat "operated" the vehicle. The motor vehicle code states that an "operator" is a person "who is in actual physical control of a motor vehicle" and that "operate" or "operating" means being in actual physical control of a vehicle. The district judge dismissed the case, ruling that Yamat did not "operate" the vehicle. The prosecutor appealed to the circuit court, which affirmed the district court. The Court of Appeals affirmed in a published opinion. The prosecutor appeals.

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